WISCONSIN SUPREME COURT
TUESDAY, JANUARY 13, 2004
9:45 a.m.

02-1542-CR State v. Obea S. Hayes

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison) – with District II (Waukesha) judges presiding – that affirmed a conviction in Rock County Circuit Court, Judge David G. Deininger presiding.

In this case, the Wisconsin Supreme Court will determine whether a defendant in a criminal case may, in appealing his conviction to the Court of Appeals, challenge the evidence against him even though he did not raise this issue in the trial court. The Court further is expected to decide if there was enough evidence presented at Obea Hayes' trial to warrant a verdict of guilty.

Hayes was found guilty of second-degree sexual assault after a jury trial in Rock County Circuit Court. The incident occurred on March 24, 2000, when Hayes forced himself into a woman's apartment, grabbing, fondling, and choking her. He denied the assault and testified that he and the woman had had a romantic relationship and that he had been living at the apartment with her. In convicting Hayes, the jury determined that the State had proven the three elements of second-degree sexual assault:

1. The defendant had sexual contact with the victim.
2. The victim did not consent to the sexual contact.
3. The defendant had sexual contact with the victim by use of threat of force or violence.

Following his conviction, Hayes went directly to the Court of Appeals. His decision to do this, without first trying to convince the trial court to dismiss the charges or to enter a judgment of "not guilty" notwithstanding the jury's verdict, gave rise to the current case. Hayes conceded that the evidence was sufficient to prove #1 and #2 above, but not #3. He claimed that the sexual contact preceded the violence, rather than vice versa. He continues that claim in the Supreme Court.

In the Court of Appeals, the State argued that Hayes could not challenge the evidence against him because he had not raised this in the trial court. The court disagreed, citing past rulings in similar cases as well as Wisconsin Statute § 974.02 (2), which reads as follows:

> An appellant is not required to file a postconviction motion in the trial court prior to an appeal if the grounds are sufficiency of the evidence or issues previously raised.

The Court of Appeals did, however, affirm Hayes' conviction, noting that it does "not reverse convictions because a witness fails to describe an event in exact chronological fashion." The Supreme Court will determine whether the evidence was sufficient, and whether criminal defendants are permitted to raise sufficiency of the evidence claims on appeal if they have not raised them in the trial court.

WISCONSIN SUPREME COURT
TUESDAY, JANUARY 13, 2004
10:45 a.m.

01-1916-CR State v. Steven G. Walters

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed part and reversed part of a decision of the Walworth County Circuit Court, Judge James L. Carlson presiding.

In this case, the Wisconsin Supreme Court will clarify whether, and under what circumstances, an expert testifying in a child sexual assault trial may give information on the defendant's character traits and if those traits fit the profile of a pedophile.

In past cases[1], the Supreme Court and Court of Appeals have ruled that this type of evidence is admissible if the trial court determines it is relevant and will not unfairly prejudice or confuse the jury. However, the State argues in this current case that the Court of Appeals has wrongly interpreted these past decisions as *requiring* that character trait evidence be admitted.

On Dec. 28, 1998, Steven G. Walters was charged with three counts of sexual assault of two children (his stepdaughter and stepson who, at the time of the assaults, were 10 and 7 and, at the time of the trial, were 18 and 15). Judge John Race handled pre-trial motions in this case and ruled that Walters would be permitted to introduce expert testimony from Hollida Wakefield, a Minnesota psychologist who had evaluated Walters. She planned to testify – in spite of objections from the prosecution, which feared that this information would prejudice the jury – that Walters did not exhibit the personality characteristics commonly seen in sex offenders.

Before the trial could take place, the judges in Walworth County were rotated into new assignments and Judge James L. Carlson took over this case. He reversed Race's decision and the psychologist's testimony about Walters' character traits was barred. In making this ruling, Carlson said:

> …[F]rom just my own experience as a judge, seeing that all types of people can be involved in sexual assaults, whether they have a psychological profile of a sexual offender or not…profile testimony is not reliable.

The trial proceeded and, on Jan. 23, 2001, Walters was convicted of all three charges.

Walters appealed, and the Court of Appeals reversed the conviction on the grounds that Wakefield's character-trait testimony should have been permitted. The State now has appealed that ruling, and the Supreme Court will decide whether the jury should have been allowed to hear the psychologist's testimony on the character traits of a sex offender.

---

[1] State v. Richard A.P., 223 Wis. 2d 777, 589 N.W.2d 674 (Ct. App. 1998); State v. Davis, 2002 WI 75, 254 Wis. 2d 1, 645 N.W.2d 913

WISCONSIN SUPREME COURT
TUESDAY, JANUARY 13, 2004
1:30 p.m.

02-1809-CR State v. James D. Crochiere

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a conviction in Marathon County Circuit Court, Judge Patrick M. Brady presiding.

In this case, the Wisconsin Supreme Court will decide if a trial court may modify a Truth-in-Sentencing (TIS) sentence for a defendant who presents new factors such as a change to minimum-security status or a serious illness to demonstrate that s/he is needlessly incarcerated.

TIS applies to crimes committed on and after Dec. 31, 1999. Under TIS, the defendant serves the full amount of time the judge imposes and is not eligible for early release through parole. The Legislature amended TIS effective Feb. 1, 2003, so there is a group of cases involving crimes committed between Dec. 31, 1999 and Jan. 31, 2003, that are known as "TIS I" cases and are handled differently than "TIS II" cases, which are cases that involve crimes committed on or after Feb. 1, 2003. This case is a "TIS I". The TIS II law gives inmates a limited right to seek sentence modification.

James D. Crochiere pleaded guilty to, and was convicted of, two felonies and third-offense drunk driving. He was sentenced under TIS to three years' confinement followed by five years' extended supervision. He asked the trial judge to modify his sentence because he had been classified as a minimum-security prisoner and was living in a dormitory at a security camp and working for the Department of Natural Resources for .24 cents per hour, a rate that would not allow him to pay child support and restitution. Why, he argued, should taxpayers pay for his incarceration when he could be transferred to the county jail with work-release privileges and return to his former, $10-per-hour job?

The trial court did not see Crochiere's security classification and child-support obligations as new factors that merited a change in his sentence. The Court of Appeals agreed.

The Supreme Court will decide whether the trial judge should be permitted to reevaluate Crochiere's sentence based upon the changes in his circumstances.

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 14, 2004
9:45 a.m.

02-2781-CR State v. Johnnie Carprue

This is a review of a split decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a ruling of the Milwaukee County Circuit Court, Judge Jacqueline D. Schellinger presiding.

In this case, the Wisconsin Supreme Court will decide whether a trial court judge violated a defendant's right to a fair trial when the judge questioned a witness. The Court is also expected to decide if the defense attorney should have objected to this questioning.

In May 2001, Johnnie Carprue was charged with second-degree sexual assault. At trial, he said the sex was consensual. When the State presented evidence that Carprue had tried to hide when police arrived, he explained that this was not because he feared arrest for sexual assault, but rather because he knew he had violated in-house corrections rules in effect for a different offense and thought the police were there to arrest him for that.

After Carprue testified on his alleged confusion about the police presence, the judge took an action that was later characterized by a different judge reviewing the case as "out of the ordinary." She excused the jury and called corrections employee Kenneth Morrow to the stand. Morrow was in court at the request of the defense, which had asked him to bring Carprue's file. The judge questioned Morrow about what happens when an individual on monitored release fails to make a telephone check-in; Morrow explained that an arrest warrant is requested but police are not immediately called. Morrow said Carprue would have been told about this procedure prior to his release.

The jury was then called back into court and the prosecutor – who had listened to the judge's questions of Morrow – called Morrow to the stand and had him describe the same procedures the judge had questioned him about. Carprue ultimately was convicted and sentenced to 25 years (15 years of confinement).

Carprue filed a motion for a new trial, arguing that the judge had been biased against him and that her actions amounted to giving the prosecution hints about whom to call to the witness stand and what to ask. The judge who decided that motion acknowledged that the trial judge's actions were unusual, but concluded that Carprue nonetheless had received a fair trial.

The Court of Appeals disagreed. On a 2-1 vote, it reversed the conviction, finding that the judge's actions gave the appearance that she was not neutral. Every criminal defendant, the majority noted, is entitled to a fair trail before an impartial judge. While judges are permitted to question witnesses, that authority should be exercised with caution – generally to clarify a witness' testimony rather than to elicit information, the majority wrote. The dissenting judge noted that a trial is a search for the truth and said that the judge did nothing wrong by questioning Morrow.

The State now has appealed the reversal of Carprue's conviction to the Supreme Court, which will determine whether the judge's active questioning of this witness violated the defendant's right to a fair trial.

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 14, 2004
10:45 a.m.

02-2490-W State ex rel. Ralph A. Kalal v. Circuit Court for Dane County, et al

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which denied a petition for a supervisory writ. This case began in Dane County Circuit Court, Judge John V. Finn (who normally sits in Portage County Circuit Court) presiding.

In this case, the Wisconsin Supreme Court will clarify when a trial court judge may permit a private citizen to file a criminal complaint. A criminal complaint is a statement of facts about an alleged crime. Filing this document with the court has the effect of charging the defendant(s) named in the complaint with the crimes listed.

Here is the background: Atty. Michelle Tjader worked for Atty. Ralph Kalal at his Madison law firm. In January 1999, Tjader enrolled in a 401K savings plan, under which a portion of her paychecks would be deposited into investment funds and matched by her employer. Jackie Kalal, as office manager, was responsible for setting up the account. In July 2001, Tjader decided to call Firstar Investment Services to check on her account balance. She was told that she was not listed on any retirement account with Firstar. Tjader confronted Ralph Kalal, asking for an accounting of the $12,350 that had been withheld from her paychecks. Kalal, according to Tjader, did not respond.

In August 2001, Tjader filed a report with the Madison Police Department. Three months later, she asked the Dane County District Attorney's Office to file charges against the Kalals. The district attorney did not file charges and, on Feb. 26, 2002, Tjader went to court seeking permission to file her own complaint charging the Kalals with four counts of felony theft. The judge permitted Tjader to file the complaint.

The Kalals went to the Court of Appeals, seeking a supervisory writ that would compel the judge to reverse his order. The Court of Appeals denied the Kalals' motion, and they now have come to the Supreme Court. At the center of this case is interpretation of the following state law:

> Wisconsin Statutes § 968.02(3):
> If a district attorney refuses or is unavailable to issue a complaint, a circuit judge may permit the filing of a complaint, if the judge finds there is probable cause to believe that the person to be charged has committed an offense after conducting a hearing….

In this case, the district attorney did not explicitly refuse to file a complaint; he simply did not act and the judge concluded that this inaction amounted to a refusal to file. The Kalals, however, argue that a failure to take action on a complaint from a citizen does not amount to a refusal to prosecute. They argue that unless the DA clearly refuses to file, the judge is violating the separation of powers and usurping the prosecutor's authority by permitting a private complaint to be filed.

The Supreme Court will clarify when a judge may authorize a private citizen to file a criminal complaint.

WISCONSIN SUPREME COURT
WEDNESDAY, JANUARY 14, 2004
1:30 p.m.

01-3014 In re the Marriage of: Linda Rohde-Giovanni v. Paul Albert Baumgart

This is a review of a split decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed an order of the Dane County Circuit Court, Judge Patrick J. Fiedler presiding.

In this case, the Wisconsin Supreme Court will clarify how and when maintenance that is awarded in a divorce may be modified.

Here is the background: When Linda Rohde-Giovanni and Paul Albert Baumgart divorced in 1992 after 19 years of marriage, they were given joint custody and shared physical placement of their three children. Rohde-Giovanni was working 20 hours per week and earning $8.43 per hour and Baumgart was working full-time and earning $93,000 per year. The court ordered Baumgart to pay child support until the children turned 18, and to pay maintenance to Rohde-Giovanni of $950 per month for an indefinite period.

In 2001, Baumgart asked the court to either reduce or end his maintenance payments. He noted that since the divorce Rohde-Giovanni had earned a master's degree and had become a teacher. Working two jobs, she was earning $61,000 annually. Baumgart's annual income was $105,000. They had just one child (age 16) still at home. In response to her ex-husband's motion, Rohde-Giovanni moved to increase the maintenance payments. She argued that her standard of living had slipped dramatically since the divorce and that she was deeply in debt and unable to make basic repairs on the house. She noted that she was helping their children pay for college and argued that this expense should factor in. The judge, however, decided that the payments should end as of December 2003.

The Court of Appeals, in a split decision, affirmed the trial court.

The Supreme Court will clarify the law on modification of maintenance awards and will consider whether it is permissible to look at the portion of the spouse's income that goes toward the education of adult children in assessing whether the maintenance amount is appropriate.

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 15, 2004
9:45 a.m.

02-1166 Wis. Citizens Concerned for Cranes & Doves, et al v. DNR, et al

This is a review of a split decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed an order of the Dane County Circuit Court, Judge Daniel R. Moeser presiding.

In this case, the Wisconsin Supreme Court will decide whether the state Department of Natural Resources (DNR) may establish a dove-hunting season.

In 2001, the Wisconsin Natural Resources Board established an open season on mourning doves. A member of the pigeon family, doves currently are hunted in 38 states. A group of about 250 state residents formed an organization called Wisconsin Citizens Concerned for Cranes and Doves (WCCCD) and filed suit seeking to have the Natural Resources Board's action voided. The circuit court halted the dove-hunting season, but acknowledged that the law is ambiguous. "The statutes involved in this case," Judge Daniel Moeser wrote, "are as clear as mud."

The Court of Appeals reversed in a 2-1 decision. The majority held that the following Wisconsin law authorizes the DNR to establish a season on mourning doves:

> Wisconsin Statutes § 29.014(1):
> The [DNR] shall establish and maintain open and closed seasons for fish and game and any bag limits, size limits, rest days and conditions governing the taking of fish and game that will conserve the fish and game supply and ensure the citizens of this state continued opportunities for good fishing, hunting and trapping.

The dissent, on the other hand, concluded that the word "game" in the statute was not intended to encompass doves. Judge Charles P. Dykman wrote:

> I am not as convinced as the majority that muskies and white-tailed deer are analogous [to doves]. While they are the state fish and state wildlife animal, they were not designated as Wisconsin's "fish of peace" and "deer of peace." And they have always been the object of anglers and hunters because of their culinary and trophy status. Doves have not achieved that status. I have yet to see a stuffed dove hanging on anyone's wall.

The question of whether doves qualify as "game" is central to this case. Two sections of the statutes are key. The first, 29.014 (1) permits the DNR to set hunting seasons for game, which is defined to include "all varieties of wild birds." The second, 29.001 (39), defines "game birds" by listing certain species – leaving out mourning doves. The statute indicates that any species not listed as a "game bird" is a "non-game species." So, the state laws seem to define mourning doves as both game and non-game.

The Supreme Court, which denied an application for a temporary injunction that would have halted the fall 2003 dove hunt while this case was pending (thus the hunt took place), will interpret these statutes and decide whether the DNR may establish a dove-hunting season in Wisconsin.

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 15, 2004
10:45 a.m.

02-1426 Sinora Glenn, et al v. Michael T. Plante, M.D., et al

This is a review of a split decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed an order of the Milwaukee County Circuit Court, Judge Maxine A. White presiding.

In this case, the Wisconsin Supreme Court will clarify when physicians may be forced to testify as expert witnesses in medical malpractice cases. Expert witnesses testify in court cases to provide scientific, technical, or other specialized knowledge. Such witnesses sometimes are reluctant to testify against other members of their professions in the same community.

In making its decision, the Court is expected to analyze its 1999 opinion in Burnett v. Alt[2], a medical malpractice case in which, on a split decision, the Court concluded that an expert witness has the right to refuse to testify unless there are "compelling circumstances". In the current case, both lower courts found that compelling circumstances did exist to compel Charles Koh, M.D., to testify in patient Sinora Glenn's lawsuit against Michael T. Plante, M.D. The Supreme Court will take another look.

In 1995 and 1996, when Glenn was in her mid-20s, she underwent a hysterectomy and two additional operations to remove both ovaries. These operations were, in the opinion of Koh, who later treated her, not necessary.

In 1999, Glenn and her husband sued Plante, who had performed the operations. Glenn was told to submit the names of the expert witnesses whom she planned to call by Sept. 23, 1999. Three months after the deadline, Plante filed a motion to dismiss the case because Glenn had not filed her witness list. Glenn then submitted Koh's name as an expert witness, in spite of the fact that Koh had indicated he did not wish to testify. "[M]ost doctors do not wish to play a leading role in any malpractice case against another local physician," Koh explained in a letter to the judge in February 2000. Glenn asked the judge for more time to find other expert witnesses, but that motion was denied. She was, however, permitted to proceed with the case and the judge ruled that Koh would be compelled to testify.

Plante, the physician being sued, appealed the judge's decision. He argued that, by missing the deadline, Glenn created the "compelling circumstances" that were forcing Koh to testify. The Court of Appeals disagreed with Plante on a 2-1 vote and allowed the case to proceed.

Plante now has come to the Supreme Court, where he renews his argument that Koh should not be compelled to testify against him simply because the plaintiff missed the deadline for finding another expert. The Supreme Court will clarify the circumstances under which an expert witness may be forced to testify.

---

[2] 224 Wis. 2d 72, 589 N.W.2d 21 (1999). Justice Ann Walsh Bradley dissented, joined by Chief Justice Shirley S. Abrahamson.

WISCONSIN SUPREME COURT
THURSDAY, JANUARY 15, 2004
1:30 p.m.

02-1582 Ralph E. Beecher v. LIRC, et al

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which reversed an order of the Kenosha County Circuit Court, Judge Michael Fisher presiding.

In this case, the Wisconsin Supreme Court will clarify how much evidence an "odd-lot" worker must present in order to show that s/he suffers from a total, permanent disability for purposes of collecting worker's compensation.

Odd-lot workers are individuals whose skills drastically limit their job options. An odd-lot worker is considered totally disabled if the only services s/he can perform are so limited in quality, dependability, or quantity that a reasonably stable job market does not exist for that person. To prove total disability, the worker must provide solid evidence of his/her inability to work. The burden then shifts to the employer to rebut that evidence. The question of which side must prove the availability – or unavailability – of suitable work for the individual is a question to be answered in this case.

Ralph E. Beecher, 61, has a ninth-grade education. He worked for Outokumpu Copper Kenosha, Inc., a foundry, for 29 years. He was assigned to the "Z-mill" machine, which runs sheets of metal from one large roll to another. The job required Beecher to lean over the first roll of metal and pick up the metal sheet, threading it into the other roll. He then had to wind the sheet from the first roll to the second, thread the sheet into the Z-mill machine, and rewind it. The metal sheets were five to eight inches wide and approximately two inches thick; an entire roll might weigh 15,000 pounds.

In 1997, Beecher developed sharp pains in his lower back, leading him to see an orthopedist. The pain increased until Beecher could no longer work. After undergoing three surgeries, Beecher returned to light-duty work in April 1998. He worked for two weeks until there were no more light-duty assignments for him. Outokumpu, a Finnish company, since has moved out of Wisconsin without offering to relocate Beecher.

Beecher applied for worker's compensation, presenting information from two doctors and two vocational experts. The Worker's Compensation Division of the Department of Workforce Development found in Beecher's favor; however, the Labor and Industry Review Commission (LIRC) partially reversed the finding, concluding that he was 60 percent disabled.

Beecher appealed to the circuit court and lost. The Court of Appeals, however, reversed the LIRC's conclusion, reinstating the original finding of full, permanent disability and total, permanent loss of earning capacity.

The LIRC appealed to the Supreme Court, focusing its argument in part on Beecher's lack of proof that he tried, and failed, to find suitable employment. Beecher, in turn, argues that the law does not require him to prove this. The Supreme Court will clarify whether the odd-lot employee or the employer has the burden to prove the existence – or non-existence – of suitable work.

WISCONSIN SUPREME COURT
TUESDAY, JANUARY 27, 2004
9:45 a.m.

03-0421 Dairyland Greyhound Park v. James E. Doyle, et al

This is a certification from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals may certify cases that cannot be decided by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case began in Dane County Circuit Court, Judge Richard J. Callaway presiding.

Like the other case the Supreme Court will hear this morning, this case focuses on Indian gaming in Wisconsin. In this case, the Supreme Court will determine whether the governor has the authority to extend Indian gaming compacts in Wisconsin. In particular, the Court will focus on whether a 1993 constitutional amendment was intended to stop this type of gambling in Wisconsin.

Here is the background: In 1991 and 1992, Gov. Tommy Thompson negotiated gaming compacts with 11 Wisconsin Indian tribes, allowing them to open and operate casinos in the state. In 1993, the Wisconsin Constitution was amended to limit gambling in Wisconsin. On-track pari-mutuel betting was still permitted, as was the state lottery without casino-type games. The amendment reads in part:

> Notwithstanding the authorization of a state lottery … the following games … may not be conducted by the state as a lottery … [including] poker, roulette, craps …

Dairyland Greyhound Park contends that this amendment was intended to end Indian gaming in Wisconsin by barring the governor from renewing the compacts. According to Dairyland, the casinos have been operating illegally since 1993. This lawsuit, originally filed against Gov. Scott McCallum, seeks to stop Gov. Jim Doyle from renewing or extending the gaming compacts.

The circuit court disagreed with Dairyland, finding that – as the governor argues – the constitutional amendment was not intended to, and does not, affect the compacts. The circuit court further noted that the Legislature has delegated power to the governor to enter into gaming compacts.[3]

The Court of Appeals determined that the issues raised in this case should be addressed directly by the Supreme Court, which will determine if the 1993 constitutional amendment was intended to bar Indian gaming in Wisconsin.

[3] Wis. Stats. § 14.035

WISCONSIN SUPREME COURT
TUESDAY, JANUARY 27, 2004
10:45 a.m.

03-0910-OA Mary E. Panzer, et al v. James E. Doyle, et al

This is an original action, meaning that the case has not been heard in any lower state court. The Supreme Court takes original jurisdiction in a very limited number of cases that generally present issues of pressing, statewide concern.

In this case, the Wisconsin Supreme Court will decide whether the governor has the authority to enter into a perpetual compact with the Forest County Potawatomi. There are 10 other tribes that operate casinos in Wisconsin and have similar compacts, and while the Forest County Potawatomi compact is the only one being challenged right now, the Court's opinion in this case will affect the others.

Here is the background: In 1991 and 1992, Gov. Tommy Thompson negotiated gaming compacts with 11 Wisconsin Indian tribes, allowing them to open and operate casinos in the state. These compacts were for seven-year terms and, in 1998 and 1999, were extended for additional five-year periods. In February 2003, Gov. Jim Doyle approved a perpetual compact with the Forest County Potawatomi. The compact will not end unless both the state and the tribe agree to end it.

Republican leaders in both houses of the Wisconsin Legislature – Senate Majority Leader Mary Panzer and Assembly Speaker John Gard – sued Doyle and Department of Administration Secretary Marc Marotta in April 2003. Lawyers for Doyle attempted to move the case into the federal court system, but a federal judge returned it to the state Supreme Court, which then appointed a reserve judge to meet with the litigants and ensure that they had resolved factual disputes to clear the way for the Court to handle the case.

Panzer and Gard argue that the governor does not have the authority to commit the state to perpetual compacts with the tribes. They argue that these "forever" agreements usurp the power of the Legislature and of future governors to take actions on gaming. They also maintain that the Potawatomi compact, which permits additional games and simulcast wagering on horse races, violates the 1993 constitutional amendment that was intended to limit the expansion of gaming in Wisconsin.

The governor, on the other hand, argues that the 1993 constitutional amendment was never intended to affect tribal gaming under the compacts that were already in existence. He further argues that the time for taking legal action to stop Indian gaming was 13 years ago, when it began in Wisconsin. He maintains that Panzer and Gard gave up their right to challenge Indian gaming by not stepping up sooner, and that he did not need legislative authority for this agreement with the tribes.

The Supreme Court will decide whether the governor has the power to enter into perpetual gaming compacts with Indian tribes.

WISCONSIN SUPREME COURT
TUESDAY, JANUARY 27, 2004
1:30 p.m.

02-0386-D In the Matter of Disciplinary Proceedings Against Alan D. Eisenberg, Atty. at Law: OLR v. Alan D. Eisenberg

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates and, if warranted, prosecutes the attorney. A referee – a court-appointed attorney or reserve judge – hears the discipline cases and makes disciplinary recommendations to the Supreme Court.

In this case, the Supreme Court will decide whether to revoke the law license of Milwaukee Atty. Alan D. Eisenberg.

Here is the background: Eisenberg has been practicing law in Wisconsin since 1966. During that time, he has been disciplined a number of times:

- 1970: one-year suspension for vindictive/harassing behavior toward a judge
- 1988: two-year suspension for conflict of interest, offensive personality, dishonesty/fraud/deceit/misrepresentation (he was not officially reinstated until 1994)
- 1996: public reprimand for failing to close a trust account during his previous suspension

The current case involves a number of alleged ethics-code violations arising out of five incidents. The first two counts come from a divorce case involving a woman who elected to have Eisenberg's former associate, Atty. Lori Murphy, continue to represent her after Murphy left Eisenberg's firm. Eisenberg and Murphy had a dispute about the payment in this case and Eisenberg, according to the referee who heard the case for the OLR, unreasonably delayed the transfer of the client's file and fabricated billings in an attempt to convince a judge that he was owed money.

The next counts against Eisenberg involve an allegation that he lied about his disciplinary history on a form that he submitted to a California court.

Another count arises out of Eisenberg's appearance before a hearing examiner for the Wisconsin Department of Transportation. Eisenberg, according to the OLR, refused to follow the rules, left with his client before the hearing ended, and generally tried to disrupt the proceeding.

Another count against Eisenberg alleges that he had a conflict of interest in his representation of a law client who owned a building that Eisenberg's real estate firm listed for sale.

The final counts come from an incident that occurred in the state of Oregon, where Eisenberg was representing a criminal defendant. The client received a telephone message from a local detective asking for a return call. Eisenberg, who said that he believed the detective was harassing his client, called the number several times from a restaurant and ended up reaching police dispatch. He claimed there was a "life or death

emergency", used vulgar language, and demanded to speak with the detective. It turned out that the detective had called Eisenberg's client on an unrelated matter. After listening to an audiotape of Eisenberg's phone calls, the referee found that: "He threatened, lied, demanded, swore, insulted, and hung up. He was obviously angry; he was rude; he was obnoxious on the phone; he was obnoxious for hanging it up; and he was obnoxious for leaving the Dispatcher on hold, which was something he apparently thought was funny…." Eisenberg conceded that the calls were "contentious" but stressed that he had called the detective's desk and not 911.

The OLR originally requested a one-year suspension of Eisenberg's law license, but the referee recommended revocation. The Supreme Court will decide what discipline to impose.